Supreme Court, U.S.
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No. 95-

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SOON Y. PARK,

Petitioner,

v.

HOWARD UNIVERSITY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This action under title VII of the Civil Rights Act of 1964 arises from a hostile work environment to which the employer subjected petitioner because of her Korean origin. Petitioner's earlier and timely complaint to the EEOC described in detail the then most recent episode in the employer's continuing pattern of discriminatory conduct against her. The "core facts" of that complaint and of the hostile work environment claim "were interlocking" and arose "from the same nucleus of operative facts."

The question presented is whether the court below erroneously barred petitioner's title VII action for failure to exhaust administrative remedies.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statutory Provision Involved 2

Statement of the Case 3

Proceedings in the District Court 3

Evidence of administrative exhaustion 5

Reversal by the Court of Appeals 7

Reasons For Granting the Writ 8

Conclusion 15

Appendix

TABLE OF AUTHORITIES

Cases: **Page**

Babrocky v. Jewel Food Co. & Retail Meatcutters, 773 F.2d 857 (CA7 1985) 9

Cheek v. Western and Southern Life Ins. Co., 31 F.3d 497 (CA7 1994) 11

Chisholm v. United States Postal Service, 665 F.2d 482 (CA4 1981) 9

Equal Employment Opportunity Commission v. Bailey Co., 563 F.2d 439 (CA6 1977), *cert. denied*, 435 U.S. 915 (1978) 9

Equal Employment Opportunity Commission v. Delight Wholesale Co., 973 F.2d 664 (CA8 1992) 9

Equal Employment Opportunity Commission v. General Electric Co., 532 F.2d 359 (CA4 1976) 13

Equal Employment Opportunity Commission v. Huttig Sash & Door Co., 511 F.2d 453 (CA5 1984) 13

Graniteville Co. v. EEOC, 438 F.2d 32 (CA4 1971) 13

Green v. Los Angeles City Superintendent of Sch., 883 F.2d 1472 (CA9 1989) 9

Love v. Pullman Company, 404 U.S. 522 (1972) 8

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (CADC 1973) 9

McBride v. Delta Airlines, 551 F.2d 113 (CA6), *vacated on other grounds*, 434 U.S. 916 (1977) 13

Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (CA3 1976), *cert. denied*, 429 U.S. 1041 (1977) 9

Park v. Howard University, 881 F.Supp. 653 (D.D.C. 1995) 2

Powers v. Grinnell Corp., 915 F.2d 34 (CAl 1990) 9, 13

Rush v. McDonald's Corp., Inc., 966 F.2d 1104 (CA7 Cir. 1992) 14

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (CA5 1970) 8-10, 15

Scott v. City of Overland Park, 595 F.Supp. 520 (D.Kansas 1984) 9

Smith v. American President Lines, Inc., 571 F.2d 102 (CA2 1978) 9

Tart v. Hill Behan Lumber Co., 31 F.3d 668 (CA8 1994) 14

Wu v. Thomas, 863 F.2d 1543 (CA11),
rhg. denied, 871 F.2d 122 (1989) 9

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 8

Statutes:

28 U.S.C. 1254(1) 2

42 U.S.C. 2000e-5(b) and (f) 2-3

In The
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SOON Y. PARK,
Petitioner

v.

HOWARD UNIVERSITY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Soon Y. Park petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 15, 1995.

OPINIONS BELOW

The opinion of the court of appeals is reported at 71 F.3d 904 and is reproduced in the appendix hereto at page 1 ("A1"). The Memorandum-Opinion of the district court (A16) that was reversed by the court of appeals is unreported. Orders of the court of appeals denying a petition

for rehearing and a suggestion for rehearing in banc, both entered on February 12, 1996 (A10, A12), are unreported. Other opinions of the district court in this case are reported at 863 F.Supp. 14 (D.D.C., September 23, 1994) and 881 F.Supp. 653 (D.D.C., February 23, 1995).

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1995, and the petition for rehearing was denied on February 12, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

This case involves application of the following language of 42 U.S.C. 2000e-5(b) and (f):

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) . . . and shall make an investigation thereof.
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> (f)(l) . . . If a charge filed with the Commission pursuant to subsection (b) . . . is dismissed . . . or [one of several actions has not been taken by the Commission] the Commission . . . shall so notify he

> person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved.

STATEMENT OF THE CASE

Proceedings in the District Court

Soon Y. Park, a member of the faculty of the College of Pharmacy at Howard University, filed this action on November 25, 1992, alleging discrimination by the University upon the basis of her sex and national origin. She alleged generally that she had "exhausted her administrative remedies." The University both denied this allegation and asserted as an affirmative defense that "Plaintiff has failed to exhaust her administrative remedies."

After a four day bench trial, the district court determined that the plaintiff's action -- although her amended complaint in form stated but a single claim -- consisted of three claims: a claim of sexual harassment, a claim for her non-selection as assistant dean for student affairs, and a claim of hostile work environment. A17. The sexual harassment claim having been previously dismissed by summary judgment (A14) and the court finding that the white male selected as assistant dean for student affairs was in fact better qualified (A25-26, pars. 28-30), the court proceeded to make detailed findings regarding hostile work environment and found that over an eight year period "[t]he conditions and privileges of plaintiff's employment at Howard have been affected seriously by discriminatory conduct" (A32), that the discriminatory conduct was "continuous" (A33), and that "the conduct of Dr. Park's supervisors was sufficiently

pervasive to amount to harassment which created a hostile work environment." A34-35. Regarding the University having discouraged her application for the position of assistant dean for student affairs and its inaction on her application once filed, the court found that she had been discriminated against on the basis of her national origin and that this was a factor in the oppressively hostile work environment. A26, pars. 29-30; A34; A51. The court further found that the defendant's discriminatory conduct and its attendant hostile environment continued after the filing of the action and through the time of trial. A26-27, pars. 31-32.

Regarding administrative exhaustion, the district court determined:

> Plaintiff filed a complaint with the District of Columbia Department of Human Rights and Minority Business Development on September 23, 1992, which was cross-filed with the United States Equal Opportunity Commission ("EEOC"). Plaintifff has exhausted her administrative remedies and the EEOC issued plaintiff a notice of her right to sue.

A28-29.

In a separate Memorandum Opinion and Order of September 23, 1994 (A37), the district court assessed damages against the University, and in a further order, of February 23, 1995 (A42), awarded an attorney fee and costs. In its fee memorandum, the court, responding to an assertion by the defendant that the claim regarding non-selection for assistant dean was discrete and separate from the claim of hostile environment, revisited and elaborated its earlier

holding on the relationship between the two claims. A43-55. More particulary, the court emphasized that the claims "arise from the same nucleus of operative facts," A43, and that "the core facts to the claim[s] of . . . denial of the assistant deanship are interlocking with, and supportive evidence of, the claim of hostile work environment," A55, n.9. In assessing the cumulative effect of this discrimination upon the plaintiff's career, the Court concluded that "Dr. Park was stripped of every professional position and privilege she had earned as a faculty member at Howard," A38.

Evidence of administrative exhaustion

Shortly before submitting a pre-complaint questionnaire to the District of Columbia Department of Human Rights and Minority Business Development on August 13, 1992, Dr. Park complained directly to several responsible officials at the University. On June 3, 1992 she wrote the Executive Vice President of the University regarding the failure of Dr. Hill, Dean of the College of Pharmacy, to address her earlier complaints concerning the College's failings in "the adminstrative advancement of female faculty of the College of Pharmacy," including the fact she "was not given EQUAL OPPORTUNITY to be considered for" the position of assistant dean. A59-60. In a note to her department chair on July 8, 1992, she requested an opportunity to discuss "1. Sexual Harrasement [sic] cases at HUH" and "2. Harrasement/blocking one's professional career at HUH." A61. In a further memorandum of July 13, 1992 to her department chair (A62)she noted that she had brought these issues to his "attention verbally and/or in writing for many years" (A62), that she had received no "meaningful response or solution" (A63), that the Dean had demonstrated lack of sensitivity, and that she was being "ignored" (A65).

On August 13, 1992 Dr. Park prepared and submitted a four page pre-complaint questionnaire to the District of Columbia Department of Human Rights and Minority Business Development on a form used by that office. A66-74. In the questionnaire, plaintiff complained she had been discriminated against by Howard on the basis of both sex and national origin. A67. She checked boxes indicating discrimination by being "Denied Promotion," by "Differential Treatment," and by "Sexual Harassment." Id. Although the form provided no box for discriminatorily hostile work environment, she attached a two-page typewritten statement detailing conduct of Howard she believed to have been discriminatory from 1985 to the date of her complaint. A71-74. She responded to a request for the name of any "representative of management" with whom she had discussed her problem by naming the vice-president of the University, the dean of her College, and the chairman of her department. A68. Asked to list the names, titles, and telephone numbers of persons she felt could provide evidence, she responded, "I will provide them on the interview day." A69. She concluded by stating, "I have documentation which substantiate that I was continually discriminated and harassed based on sex and national origin (Korean)." A74.

Plaintiff filed her formal, sworn complaint with the same office on September 23, 1992, asserting Howard had discriminated "by subjecting [her] to differential treatment in terms and conditions of employment." A75. In a blank calling for the date "on or about" which the violation occurred, plaintiff inserted "March 25, 1992 and continuing." *Id.* Under the heading "The Particulars Are," she detailed the most recent of Howard's actions that she had detailed in her pre-complaint questionnaire, namely her

non-selection for assistant dean for student affairs. A70-72. In the course of this narration, she recounted a meeting at which statements were made concerning the Dean's control of the selection, promotion, and tenure process and concluded saying, "It is my belief that I was denied the opportunity for advancement in my career because of my sex (female) and my national origin (Korean)." A72.

Reversal by the Court of Appeals

The Court of Appeals reversed the District Court on the sole ground that "Park failed to exhaust her administrative remedies for this claim before the Equal Employment Opportunity Commission ("EEOC") prior to filing suit." A2. Quoting the full text of Dr. Park's narration that appears in her EEOC complaint under the heading "The Particulars Are," the court stated that her charge "did not express or even hint at a national origin hostile work environment claim" (A5) and concluded that "Park's charge not only lacks the words 'hostile work environment,' but also lacks any factual allegations supporting such claim." A7.

With respect to the claim which Dr. Park concededly stated in her formal EEOC complaint, the court stated that "[h]er challenge to the selection of Nicholas as Assistant Dean does not incorporate the various other claims relied upon by the District Court in its finding of a hostile work environment, and the charge does not incorporate any other challenges to Howard's action." A7.

With respect to the evidence that Dr. Park fully described her "various other claims" in her pre-complaint questionnaire, the court conceded "[i]t would be possible to construe some of the wording in that statement to make out

a hostile work environment claim," but concluded that, because the questionnaire was neither sworn to nor accessible to Howard, it was "not the same as an EEOC charge." A8.

Finally, the court held that "[b]ecause Park's EEOC charge contained no claims or factual allegations that could reasonably be expected upon investigation to lead to a hostile work environment claim, . . . she failed to exhaust her administrative remedies for such a claim at the EEOC." A8-9.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the Court of Appeals, in reversing the District Court's finding that the plaintiff exhausted her administrative remedies, has constructed a new rule negating the well-founded rule heretofore followed in all circuits. This new rule, which was neither fully articulated nor rationalized by the Court below, required of the plaintiff a level of legal sophistication in framing her administrative claim equal to that of an attorney -- and with consequences more drastic if she slipped than for a pleading slip by her attorney in a subsequent district court action. Since this rule is not dependent upon the facts of this particular case, it can, if unreversed, have broad impact on title VII enforcement through the courts.

In *Love v. Pullman Company*, 404 U.S. 522, 526 (1972), and again in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), this Court, rejecting arguments that plaintiffs had failed to exhaust their administrative remedies under title VII of the Civil Rights Act, admonished that a technical reading of the exhaustion requirement would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Consistent with the admonition in *Love* and *Zipes*, the federal courts in all twelve circuits have adopted and followed a liberal rule, first formulated by the Fifth Circuit in *Sanchez v. Standard Brands, Inc.* 431 F.2d 455 (CA5 1970), for identifying a claim in district court with a particular complaint to the EEOC. The rule is that "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez, supra,* at 466; and *see: Powers v. Grinnell Corp.*, 915 F.2d 34, 38 (CA1 1990); *Smith v. American President Lines, Inc.*, 571 F.2d 102, 107, n.10 (CA2 1978); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (CA3 1976); *Chisholm v. United States Postal Service*, 665 F.2d 482, 491 (CA4 1981); *Equal Employment Opportunity Commission v. Bailey Co., Inc.*, 563 F.2d 439, 446 (CA6 1977); *Babrocky v. Jewel Food Co. & Retail Meatcutters*, 773 F.2d 857, 864 (CA7 1985); *Equal Employment Opportunity Commission v. Delight Wholesale Co.*, 973 F.2d 664, 668 (CA8 1992); *Green v. Los Angeles Cty. Superintendent of Sch.*, 883 F.2d 1472, 1476 (CA9 1989); *Scott v. City of Overland Park*, 595 F.Supp. 520, 526 (D.Kansas 1984); *Wu v. Thomas*, 863 F.2d 1543, 1547 (CAll 1989); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 988 (CADC 1973). Thus, the scope of an action in district court has *not* been limited to *claims* stated in an antecedent complaint to EEOC, but has been limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the EEOC charge.

The reasons for the *Sanchez* rule were stated for the court by Circuit Judge Goldberg as follows:

> Our consideration of this issue must begin with a reiteration of our conviction that procedural

> technicalities are not to stand in the way of Title VII complaints. Nothing in the Act commands or even condones the application of archaic pleading concepts. On the contrary, the Act was designed to protect the many who are unlettered and unschooled in the nuances of literary draftsmanship. It would falsify the Act's hopes and ambitions to require verbal precision and finesse from those to be protected, for we know that these endowments are often not theirs to employ.
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> Since the Act involves "a lay-initiated proceeding," Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28, 30 n.3, "it would be out of keeping with the Act to import common-law pleading niceties to [the charge of discrimination] or in turn to hog-tie the subsequent lawsuit to any such concepts." *Id.* This Act was designed to protect a worker from becoming an industrial pariah, and his lack of literary acumen should not stymie his quest for equal employment opportunity.
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> In other words, the "scope" of the judicial complaint is limited to the "scope" of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

431 F.2d at 465-466.

Thus, under *Sanchez* it is the reasonably expected "scope" of the anticipated EEOC investigation that fixes the

permissible reach of the plaintiff's subsequent court action. But the rule to be applied in determining this "scope" is critical to the meaning and practical application of *Sanchez*. Heretofore, the uniform rule in defining "scope" has been that the court action "may extend to any discrimination like or related to the substance of the allegations in the [EEOC] charge and reasonably can be expected to grow out of the investigation triggered by the charge." *Equal Employment Opportunity Commission v. Delight Wholesale Co., supra,* at 973 F.2d 668, and cases cited; and *see* the opinion below (A4-5), quoting from *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 500 (CA7 1994). The court below here followed a different and unprecedented rule. Instead of considering whether investigation triggered by Dr. Park's allegations of discrimination in the University's handling her application for assistant dean could reasonably be expected to lead to her claim of hostile work environment, the Court of Appeals looked to whether she had stated within the four corners of her EEOC complaint facts supporting such a claim. Finding that she had not, it barred her claim.

The trial record here established that *had* an investigator interviewed the plaintiff concerning the particulars of her EEOC complaint, had he interviewed her department chair, had he interviewed Dean Hill, had he looked at the plaintiff's pre-complaint questionnaire, or had he examined the documents in the plaintiff's or the University's possession, he would have been plunged directly into a hostile environment claim. *Any* investigation of the defendant's mishandling of her application for the position of assistant dean for student affairs would have necessarily looked to the Dean's motive in seeking to discourage her application and failing to act upon it once submitted. And any serious inquiry would have inexorably led to the University's seven year campaign to limit her professional advancement and denigrate her status.

It would have led to the Dean's refusal to permit the chairman of a prominent college committee to resign his chairmanship in favor of the plaintiff. A24, pars. 24-25; A32-33, A34. It would have led to the Dean's failure to respond to her complaint that she had been the subject of an ethnic slur made by one of her peers to her supervisor and other of her peers. A23-25, pars. 21-22; A49-50. It would have required explanation of the inexplicable delay in her promotion to associate professor and the consequent delay in her tenure. A21-23, pars. 15-20; A32; A48-49. It would have required explanation of her being dropped for no apparent reason from another prestigious committee. A21, par. 14. It would have required explanation of her traumatic removal from her leadership role on a subcommittee in her field of specialty -- removal by the same peer who had bandied the ethnic slur. A20-21, pars. 9-13; A33; A47-48. It would have required explanation of her peremptory removal from her assignment as coordinator of a clerkship program and her replacement by a less-qualified junior faculty member. A26-27, pars. 31-31; A34; A54. In short, it would have required an EEOC investigator to look at details of all the discriminatory conduct that the district court looked at and found to establish a hostile work environment based on her Korean origin. Such investigation would not only have flowed from the need to determine the Dean's motivation in mishandling her application for the position of assistant dean for student affairs, but would have targeted the plaintiff's more general allegation in her formal EEOC complaint that she had been "denied the opportunity for advancement in [her] career because of . . . national origin." A77.

While the district court considered the evidence that should have been adduced by an investigator, the court of appeals did not. Accordingly, while the district court found

that the administrative charge and the hostile environment claim were inextricably bound and depended on the same core of operative facts, the court of appeals by-passed such considerations and looked only at the face of the administrative complaint.

Other courts of appeal reviewing district court determinations of exhaustion have been clear that the claim in district court need not have been pled, or evidence supporting it have been set out, in the preceding EEOC charge. *See Powers v. Grinnell Corp., supra,* at 915 F.2d at 38 ("An administrative charge is not a blueprint for the litigation to follow."); *Graniteville Co. v. Equal Employment Opportunity Commission*, 438 F.2d 32, 38 (CA4 1971) (purpose of charge is to initiate EEOC investigation, "not to state sufficient facts to make out a prima facie case."); *Equal Employment Opportunity Commission v. General Electric Co.*, 532 F.2d 359, 364 (CA4 1976), quoting from *Equal Employment Opportunity Commission v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (CA5 1974) ("The charge is not to be treated as a common-law pleading that strictly cabins the investigation that results therefrom . . .. The charge merely provides the EEOC with 'a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices. '"); *McBride v. Delta Airlines*, 551 F.2d 113, 115 (CA6), *vacated on other grounds* 434 U.S. 916 (1977) (individual firing charge requires review of any racially discriminatory practices because of large and complex corporate structure).

Dr. Park's claim of hostile environment based on her Korean origin clearly "related to the substance of the allegations in [her] charge [to EEOC] and reasonably [could] be expected to grow out of the investigation triggered by the charge." *Equal Employment Opportunity Commission v.*

of hostile work environment on the basis of her Korean origin involved not only the same employer but the same agents of the same employer as did her charge of discrimination in the processing of her application for the position of assistant dean. The basis for the discrimination -- her Korean origin -- was the same in both. The time of the misconduct stated in her administrative charge was within the period of the hostile environment proven in court. The mode of discrimination -- delay, silence, rejection, and resulting diminution of her professional status through official personnel action (or inaction) -- was the same. Both the charge and the claim were "continuing" violations. The hostile environment "grew out of" specific discriminatory conduct, including the conduct described in the EEOC charge. The opposite can also be presumed -- that specific discriminatory conduct grew out of the hostile environment. It was only by insisting, as the court below did, that the claim in court be the *same* as the administrative charge could the court conclude that the claim and the charge were unrelated or that one did not grow out of the other.[1]

The decision below requires what *Sanchez* and the other courts of appeals have said should not be required. It permits -- indeed mandates -- "procedural technicalities . . .

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[1]The opinion below suggests that the court felt constrained by holdings such as *Rush v. McDonald's Corp., Inc.*, 966 F.2d 1104 (CA7 1992), and *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668 (CA7 1992), from considering the relationship between a discrete discriminatory act of the employer and a broader claim of hostile environment created by a multiplicity of such acts. The court, however, failed to distinguish between cases of coemployee harassment, as in *Rush* and *Tart*, and cases such as this in which the hostile environment was created directly by the employer.

to stand in the way of Title VII complainants." *Sanchez v. Standard Brands, Inc., supra*, at 431 F.2d 455. It not only "condones" but commands "the application of archaic pleading concepts." *Id.* It fails to apply the Act "to protect the many who are unlettered and unschooled in the nuances of literary draftsmanship." *Id.* It "falsif[ies] the Act's hopes and ambitions [by requiring] verbal precision and finesse from those to be protected, . . . know[ing] that these endowments are often not theirs to employ." *Id.* It "import[s] common-law pleading niceties. . . [which] in turn . . . hog-tie the subsequent lawsuit." *Id.* It structures a rule that will leave the plaintiff a "pariah" in her workplace. *Id.* In sum, it rejects the guiding admonition of *Love* and *Zipes* that a technical reading of the exhaustion requirement is inappropriate and thereby sets itself at odds with other circuits.

CONCLUSION

The court below having erroneously departed from the rule that the scope of an action under title VII of the Civil Rights Act is limited only by the scope of the investigation reasonably expected to grow out of the EEOC complaint, the petition should be granted and, in light of the error being clear without need of further briefing or argument, the judgment below should be summarily reversed.

Respectfully submitted,

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